

Blue Circle Cement Company, Inc. and United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO and its Local D421.
Case 17-CA-15775

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On September 23, 1992, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Parties filed cross-exceptions and a brief in support thereof and in opposition to the Respondent's exceptions, and the Respondent filed a brief in reply to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(1) by suspending and discharging employee Stephen Saunders. The Respondent has excepted, contending, *inter alia*, that the conduct for which Saunders was discharged—namely his use of a Respondent-owned photocopier to reproduce certain documents related to hazardous waste—was not protected concerted activity within the meaning of Section 7 of the Act. For the reasons set out below, we agree with the judge that it was.

*A. Summary of Credited or Undisputed Evidence
Related to the Finding of Protected
Concerted Activity*

The evidence shows that early in 1991¹ officers of Local D421 (the Union), the recognized bargaining representative, became aware that the Respondent, a cement manufacturer, was making plans to burn hazardous waste as a fuel to heat its cement kilns. The Union decided to actively oppose the Respondent's plans because of health and safety concerns.² To that

end, Union President Robert Joe Thompson appointed Saunders as the Union's environmental officer and spokesperson to lead the fight against the Respondent's plan. According to Thompson, the Union wanted to enlist community support for its position. Thompson testified that the Union selected Saunders because of his background, interest, and "contacts" pertaining to environmental issues. More particularly, Saunders was a founder and member of a nonprofit volunteer local environmental organization called Earth Concerns of Oklahoma (ECO). Like the Union, ECO opposed the Respondent's plan to burn hazardous waste and Saunders too was its spokesperson, as well as the Union's. Indeed, as the judge found, Saunders essentially was "wearing two hats" when opposing the Respondent's plan.

Saunders' activities in opposition to the Respondent's plan were numerous and took on a variety of forms. He solicited ideas from other unit employees and discussed the issue at union meetings. He organized community opposition and organized rallies near the Respondent's plant that were attended by employees and nearby residents.³ He discussed the Respondent's plan with local media covering the rallies. He discussed the issue informally with the Respondent's plant operations manager, Douglas Pardee, on frequent occasions. He researched the burning of hazardous wastes at other cement plants and the nature of hazardous materials.⁴ And he participated in ongoing union picketing outside the Respondent's plant that commenced in March and continued long thereafter.⁵

On July 27, Pardee observed Saunders using the Respondent's photocopier during worktime. On closer inspection, Pardee saw that Saunders was photocopying from a publication on "sham recycling" produced by the environmental organization Greenpeace on the topic of toxicological properties of heavy metals.⁶ Pardee testified that when he confronted Saunders at the photocopier he told Saunders that "this must be the biggest joke for ECO that you can sit here and

Union never "entered into any agreement" with the Respondent manifesting acquiescence in the Respondent's "use of hazardous waste as fuel."

³ In connection with one such rally, held on June 3, a leaflet publicizing the rally was distributed by Saunders jointly on behalf of the Union, ECO, and other environmental groups expressly "asking citizens to join us in a demonstration in solidarity with workers and residents threatened by hazardous waste burning."

⁴ As the judge found, on one occasion the Respondent gave Saunders a large chart entitled "Toxic and Hazardous Chemicals in Industry."

⁵ At the time of these activities, the Union was also attempting to achieve a successor bargaining agreement with the Respondent. Its rallies and picketing combined the hazardous waste issue with contractual economic issues.

⁶ As the judge found, Saunders had been concerned that heavy metals in hazardous waste would be released by the Respondent's burning of hazardous waste. Saunders photocopied five copies of a 7-page section of the publication.

¹ All dates are in 1991 unless stated.

² Although in bargaining sessions on June 13 and 14 representatives of the Union's parent International expressed conditional support for the Respondent's waste-burning plan, the Union (which was identified in the most recent collective-bargaining agreement as "the sole" bargaining agent of the employees covered by the agreement) consistently opposed the plan when acting on its own. It manifested its opposition in rallies and picketing of the Respondent's plant. Moreover, as the judge found, notwithstanding the comments by the International representatives in those two negotiating sessions, the

copy their materials on my machine and distribute it against us.”

Pardee suspended Saunders on July 27 and, on August 5, Pardee discharged Saunders. Consistent with Pardee’s initial reaction that Saunders intended to distribute the photocopied materials in opposition to the Respondent’s plan to burn hazardous waste, Pardee’s discharge letter to Saunders stated that the Respondent “cannot condone an employee working against the Company’s legitimate business interests” by using its equipment and materials on paid time.

B. Discussion

It is essentially undisputed that the Respondent’s discipline of Saunders was attributable to Saunders’ use of the photocopier, on paid time, to reproduce materials for distribution in opposition to the Respondent’s plan to burn hazardous waste. The Respondent argues, however, that this activity was entirely personal and not in any way connected with the Union, and thus falls outside the scope of Section 7. We disagree because, as the judge found, the actions in question were a logical outgrowth of the multiple efforts of Saunders and the Union to oppose the Respondent’s plan to burn hazardous waste.

The Union’s strategic efforts were broad in scope and encompassed enlisting support from the local community, including ECO and other environmental groups, to oppose the Respondent’s plan. Further, Saunders’ duties and activities in opposing the plan, as spokesperson for both the Union and ECO, were intimately connected to, and derived from, the Union’s broad-based strategic efforts. As a practical matter, therefore, Saunders’ efforts on behalf of the Union and on behalf of ECO, in opposing the Respondent’s plan, were virtually inseparable.

In these circumstances, it is immaterial that the photocopied materials pertaining to toxicological properties were intended, as the judge found, for persons having no “direct connection” with the Respondent, i.e., for ECO, and not for officers of the Union.⁷ Saunders’ photocopying of materials for distribution to others opposed to the Respondent’s plan, and who previously had joined efforts with the Union in this endeavor, was simply one of the myriad activities that Saunders undertook for the purpose of achieving the Union’s goal, the employees’ goal, Saunders’ personal goal, and ECO’s goal—to oppose and to stop the Respondent’s plan to burn hazardous waste. Put another way, Saunders’ photocopying was yet another form of concerted activity undertaken for the purpose of protecting the health and safety of those affected by the Respondent’s plan, including, of course, the health and safety of his fellow bargaining unit employees most di-

rectly affected by the plan. Further, the Respondent was well aware of Saunders’ activist role in these endeavors, including his role as union environmental officer and spokesperson and, indeed, it specifically discharged him for “working against” the Respondent’s interests.⁸

Our dissenting colleague contends that the record fails to demonstrate a sufficient factual nexus between (1) Saunders’ photocopying for ECO in opposition to the Respondent’s plan and (2) Saunders’ numerous protected concerted and union activities in opposition to the Respondent’s plan during the months and weeks preceding the photocopying. Yet, our dissenting colleague concedes that “the Union and ECO were actively linked in their public opposition to the Respondent’s plan”; he acknowledges that Saunders took on a “duality of roles” both as an ECO spokesperson and as a union officer; and, he does not take issue with the general proposition that Saunders essentially was “wearing two hats” in these dual roles. Nevertheless, with respect to the photocopying incident, he draws a bright line distinction between Saunders’ myriad roles on behalf of ECO, the Union, and the employees, and finds essentially that as to *this* incident Saunders’ activity was purely personal, was unrelated to mutual aid or protection; and insufficiently related to Saunders’ numerous previous protected concerted activities in opposition to the Respondent’s plan. Our dissenting colleague does not explain why Saunders’ numerous protected concerted activities abruptly become purely personal in character and unrelated to mutual aid or protection in this incident. More specifically, the dissent makes no attempt to explain why Saunders’ photocopying of environmental materials for ECO—materials clearly pertinent to the Respondent’s plan to burn hazardous waste—was anything other than a continuation of Saunders’ previous protected concerted activities undertaken pursuant to, in the words of our dissenting colleague, Saunders’ “duality of roles.”⁹ Ac-

⁸ As the judge found, the record shows that the Respondent routinely permitted employees to use its photocopiers during worktime to copy a variety of nonwork-related materials. It is evident, therefore, that the Respondent’s discipline of Saunders for using the photocopier during working time to photocopy materials pertaining to hazardous wastes, while permitting others to use the photocopiers with impunity, amounted to disparate treatment.

⁹ Our dissenting colleague contends that *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992), relied on by the judge, is inapposite because that case concerned whether the action of individual employees was concerted while the instant case, according to our colleague, “presents a fundamentally different question” of whether Saunders’ photocopying was protected. The judge cited *Mike Yurosek* for the proposition that Saunders’ photocopying was a logical outgrowth of earlier concerted activities that were also protected. The instant case plainly concerns whether Saunders’ photocopying was concerted (sufficiently related to group action) and protected (sufficiently related to mutual aid or protection). The judge’s citation to *Mike Yurosek* was thus pertinent.

⁷ The judge did not credit the portion of Saunders’ testimony that the photocopies were for the use of the Union’s officers.

cordingly, we find that the Respondent's discipline of Saunders violated Section 8(a)(1) of the Act.¹⁰

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Blue Circle Cement Company, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, dissenting.

Contrary to my colleagues, I find that the Respondent did not violate Section 8(a)(1) of the Act by suspending and then discharging employee Stephen Saunders for unauthorized use of the Respondent's copying machine. More specifically, I find that the General Counsel has failed to establish a sufficient nexus between (1) Saunders' use of the copying machine to copy a magazine article about sham recycling and the toxicological properties of heavy metals and (2) his activities in support of the Union's opposition to the Respondent's plan to burn hazardous waste as fuel in the Respondent's cement manufacturing process. Thus, I find that Saunders' use of the copying machine to copy the article in question was not activity protected under Section 7 of the Act, and that his suspension and discharge for using the machine to copy the article were therefore not in violation of Section 8(a)(1).

1. Background

My colleagues have capably set out the material facts. As seen, at the time of the events in question, Saunders was an active member of and a spokesman for Earth Concerns of Oklahoma (ECO), a private environmental protection group. ECO was concerned about the potentially damaging effect that the Re-

spondent's planned burning of hazardous waste in the production process might have on the environment. ECO was also concerned about what it perceived to be shortcomings in governmental regulation of industrial burning of hazardous waste in cement kilns. Thus, ECO was strongly opposed to the Respondent's plan to burn hazardous waste in the production process, at least under current Federal Environmental Protection Agency (EPA) regulations.

Saunders was also the Union's environmental officer. The Union was concerned about the potentially damaging effect that burning hazardous waste in the production process might have on the health of the employees. Thus, the Union was also opposed to the Respondent's plan. As environmental officer, Saunders was appointed by the union president to lead the Union's opposition to the Respondent's plan.

2. Evidence of relationship of copying to union activity

According to Plant Operations Manager Pardee, when he discovered Saunders copying the article, he angrily suggested to Saunders that it "must be the biggest joke for ECO that you can sit here and copy their materials on my machine and distribute it against us."¹ Saunders made no reply. But more to the point, he did not claim that he was copying the article for the Union or that he was engaged in union business.

When Pardee was in the process of suspending Saunders about an hour later, for unauthorized use of the copier to copy documents that "weren't of a company nature" (quoting Pardee's testimony about what he said to Saunders at that time), Saunders simply claimed that he had permission from all office managers to make "personal copies."² More to the point, Saunders again did not claim to have been engaged in union business.

Shortly after Pardee suspended Saunders, he discussed this matter, in separate conversations, with Union Grievance Committee Chairman Nick Adams and Union President Bobby Thompson. Neither one

¹⁰The Respondent contends that even if Saunders' discharge violated the Act, a remedy of reinstatement and backpay is inappropriate because he engaged in flagrant misconduct when he used the Respondent's postage meter in the amount of \$2.30 to send a package on July 27 and because his version of the events of that day was not credited by the judge. We find no merit to the Respondent's contention. It is undisputed that the Respondent was well aware of Saunders' conduct with respect to the package prior to his discharge; yet the Respondent does not contend that this was a reason for the discharge. Indeed, the Respondent does not take issue with the judge's statement that it "agreed" that "Saunders would not have been fired had he not used Blue Circle's photocopier to copy pages from the 'sham recycling' publication." Because the evidence shows that the postage meter incident would not itself have caused the Respondent to discharge Saunders, the Respondent cannot now rely on it as a basis for denying backpay and reinstatement. *Western Stress, Inc.*, 290 NLRB 678 fn. 3 (1988). Further, although the judge found that the Respondent's version of the events of July 27 was more credible than Saunders' version, the judge did not find Saunders to be an untrustworthy witness generally so as to amount to a malicious abuse of the Board's processes sufficient to deny the Board's usual remedies. *Owens Illinois*, 290 NLRB 1193, 1194 (1988).

¹In the day or two following his suspension of Saunders, Pardee prepared a memorandum for file summarizing this incident. The memorandum is not in evidence, but Pardee testified about it and read from it at the instant hearing. The memorandum does not say that Pardee referred to ECO during his confrontation with Saunders. According to the memorandum, as read into the record by Pardee, when Pardee discovered Saunders copying the article he told him "[T]his must be a big joke for you and your people that you are doing this work on our equipment with our supplies on our time." When the judge pointed out to Pardee that he had used the term ECO in his earlier testimony about this confrontation, Pardee replied that his memorandum was "probably more accurate."

²According to Pardee, Saunders told him "I've had permission from all the office managers to make personal copies." According to Saunders, he told Pardee "I'd used the—as everybody else had and continues to use the photocopier for personal business on a daily basis."

said anything about Saunders purportedly having been engaged in union activity when he was copying the article.

During Saunders' discharge interview a few days later, he once again did not claim that he was copying the article for the Union, or that he was engaged in union business. His only defense was that everyone else used the copier to make personal copies.³ Moreover, neither Adams nor Thompson, both of whom were also present at Saunders' discharge interview, claimed that Saunders was making the copies of the article for the Union, or that he was engaged in union business.

Finally, Saunders grieved his discharge. His grievance says nothing about his purportedly having been engaged in union activity while copying the article.

Eventually, however, at the instant hearing into this matter, Saunders finally claimed that he was copying the article to give to union officers—and the judge flatly discredited him.

3. Discussion and conclusion

There is an obvious absence of evidence to support a finding that Saunders was engaged in union activity when he copied the article opposed to the burning of hazardous waste in the production process. Nevertheless, the judge, affirmed by my colleagues, make just such a finding anyway. They arrive at this finding via the following path: (1) the article in question was opposed to the burning of hazardous waste in production processes; (2) ECO and the Union were opposed to the burning of hazardous waste, and were attempting to prevent the Respondent from doing so, in part at least because of their concern about the effect of the resulting emissions on the health of the Respondent's employees; (3) Saunders' particular ECO and union activities were aimed at preventing the Respondent from burning hazardous waste in its production process; (4) therefore, when Saunders was copying the article opposed to the burning of hazardous waste, he was acting on behalf of the Union, in furtherance of its opposition to the burning of hazardous waste, which opposition was itself bottomed on its concern over the conditions of the employees' employment.

My colleagues arrive at their result even though at the time that the events in question were actually taking place, no one—not Saunders, nor Adams, nor Thompson—claimed that Saunders was copying the article for the Union, and even though the judge indeed

³ According to Pardee, Saunders told him, "[Y]ou're discharging me for photocopying, you know, everybody else does it. It's personal copies, everybody else does it." According to Saunders, he told Pardee that "everybody did it," that he had permission to use the copier, that it was clear to him that he was not being discharged for using the copier but because of his "outspokenness on the hazardous waste issues as affecting the employees at the plant," and that Pardee was taking the matter too personally.

flatly *discredited* Saunders' belated testimonial claim at the hearing that he was copying the article for the Union.

I simply cannot agree with my colleagues' findings that Saunders' overall efforts on behalf of the Union and on behalf of ECO, in opposing the Respondent's plan to burn hazardous waste in its production process, were "virtually inseparable," and that his copying of the article opposing the burning of hazardous waste in the production process was "a logical outgrowth" of the Union's opposition to the Respondent's plan to burn such waste.⁴

My colleagues' analysis has a nice ring to it. And there *might in fact* be a sufficient nexus between (1) Saunders' use of the copying machine to copy a magazine article about sham recycling and the toxicological properties of heavy metals and (2) his activities in support of the Union's opposition to the Respondent's plan to burn hazardous waste as fuel in the Respondent's cement manufacturing process. But the problem—for me, at least—is that the existence of such a nexus is not established by a preponderance of the record evidence.

Clearly, Saunders was an active opponent of the Respondent's plan as an ECO spokesman at the same time that he was an active opponent of the plan as a union officer. But it does not necessarily follow from that duality of roles and simultaneity of situations that all—or, for that matter, any—of Saunders' actions taken in furtherance of ECO's opposition to the Respondent's plan were ipso facto also actions taken in furtherance of the Union's opposition to the plan. The

⁴ *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992), relied on by the judge for this "logical outgrowth" finding, is inapposite to the instant circumstances, and my colleagues have not convinced me that the judge was correct in applying an expanded holding from that case. The key question in that case was whether the General Counsel had made a prima facie showing that four employees who individually and separately refused an order to work overtime were nevertheless engaged in concerted activity in doing so. In finding that they were, the Board majority found that the separate refusals were a "logical outgrowth" of the employee's earlier *concerted* protest against the employer's earlier decision to *reduce* their normal work hours. The Board stated:

We will find that individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [a] logical outgrowth of the concerns expressed by the group. [Citations omitted.] Here, the employees' individual responses to [the] request that they work overtime . . . logically relate to their concerted protest over [the] reduction in their schedule only a few weeks earlier. [Id. at 1038–1039.]

The instant case, of course, presents a fundamentally different question: whether the General Counsel has established by a preponderance of the evidence that Saunders' copying of the article in question was *protected* activity, on the grounds that it was done on behalf of the Union. Moreover, the record in *Mike Yurosek* established the earlier concerted activity of the four employees, out of which their subsequent separate activity logically grew. But there is no such evidentiary predicate for finding in the instant case that Saunders' copying of the article on the Respondent's machine was the "logical outgrowth" of some prior action taken by the Union.

General Counsel needed affirmatively to prove this nexus in order to establish the alleged violation. I simply find that he has not done so.⁵

In sum, I find, contrary to my colleagues, that Saunders' copying of the magazine article was not shown by a preponderance of the evidence to have been done in furtherance of the Union's opposition to the Respondent's plan, and was thus not activity protected under Section 7 of the Act.⁶ Accordingly, I would dismiss the complaint.

⁵ Contrary to my colleagues' assertion, therefore, and as evident from my preceding analysis, I have not affirmatively found that Saunders' copying of the article was "purely personal," or that it was in fact *not* protected. Rather, I have found that the General Counsel has not proved that it *was* protected. The mere fact that the Union and ECO were actively linked in their public opposition to the Respondent's plan does not, in my view, satisfy the General Counsel's burden of proving that Saunders was engaged in union activity when he used the Respondent's copier to copy the article in question. And this is particularly so where, as here, neither the Union nor Saunders himself claimed at the time that Saunders was engaged in union activity, and the judge ultimately found that Saunders did not copy the article for the Union.

Nevertheless, my colleagues chide me for not "explain[ing]" why Saunders' photocopying of environmental materials for ECO was not just a continuation of his previous protected concerted activities undertaken in his dual role as ECO spokesman *and* union environmental officer. Thus, my colleagues would seemingly shift the burden of proof to me, to prove that Saunders was not in fact engaged in protected activity when he copied the article. But I prefer to leave the burden of proof on this question right where it belongs, with the General Counsel, to prove that Saunders *was* engaged in protected activity when he copied the article.

⁶ One final note, a clarifying one. My colleagues assert at the end of their opinion that the Respondent discharged Saunders "for 'working against' the Respondent's interests." Not exactly. Operations Manager Pardee's letter discharging Saunders states, in pertinent part:

While I have stated in the past that employees' opinions and what they do on their own personal time is their own business, the Company cannot condone an employee working against the Company's legitimate business interests while he is being paid by the Company and while he is using Company equipment and materials.

Frank Molenda, Esq., for the General Counsel.
John W. Powers, Esq. (Seyfarth, Shaw, Fairweather & Geraldson), of Chicago, Illinois, for the Respondent.
Michael J. Stapp, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, Blue Circle Cement Company, Inc., suspended and then fired employee Stephen Saunders. At issue in this proceeding is whether Blue Circle did that because of Saunders' concerted protected activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

The United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (the

Boilermakers International) and its Local D421 filed the charge in this matter on August 21, 1991. (All the events discussed in this decision occurred in 1991, unless otherwise specified.) The complaint issued on October 24. Blue Circle has admitted the jurisdictional allegations of the complaint, including the allegations that it is an employer engaged in commerce and that the Boilermakers International and Local D421 are labor organizations. But Blue Circle denies violating the Act in any respect.

The case went to hearing in Tulsa, Oklahoma, on March 9-11, 1992. The General Counsel, the Boilermakers International and Local D421 (jointly), and Blue Circle have filed briefs.

I.

Parts II and III of this decision trace the relevant events in chronological order. But some background information is necessary to provide the context in which to consider those events.

Union-Management Relations

Local D421 (sometimes referred to as the Union) represents the bargaining unit employees at the Blue Circle plant.¹ The bargaining unit includes office clerical employees as well as production and maintenance employees.

The last collective-bargaining agreement between Blue Circle and Local D421 came to an end by its own terms on April 30, 1990. Despite bargaining sessions before and after that date, no follow-on agreement was reached.

In November 1990, Blue Circle unilaterally put into effect various terms of its final offer to the Union which terms, among other things, reduced overtime pay in certain respects and reduced certain benefits. (The General Counsel does not contend that the Company violated the Act in any respect by that action.)

Many of the Company's employees remain bitter about that unilateral action and about Blue Circle's failure to provide them with what they consider to be fair terms of employment.

Blue Circle's Plan To Use "Hazardous Waste"

Blue Circle is a large corporation with facilities in many States. The only facility of concern to us here is Blue Circle's cement manufacturing plant in Tulsa. (When I refer to "Blue Circle," without further description, I will be referring only to the Tulsa facility.)

Cement is manufactured in huge kilns. Blue Circle uses coal to heat its kiln—about 100,000 tons of coal per year.

That brings us to "hazardous waste." The hazardous waste of interest to us are solvents that burn readily, producing heat as they burn—that is, hazardous waste that can be used as fuel. Such solvents do not start out as hazardous waste. But once they have been used in industrial processes (as, for instance, in cleaning aircraft), they pick up impurities. The impurities are what turn them into hazardous waste.

¹ The complaint makes no allegations about what union represents Blue Circle's employees, and on brief the Boilermakers International and Local D421 seem to contend that they jointly represent the Company's unit employees. But the most recent collective-bargaining agreement specifies that Local D421 "is the sole collective bargaining agency for the employees covered" by the agreement.

Hazardous waste, in turn, may be disposed of only in accordance with regulations issued by the U.S. Environmental Protection Agency (the EPA) and, sometimes, by state agencies.

EPA rules permit disposal of hazardous waste by burning in cement kilns. Obviously the burning of hazardous waste presents problems that the burning of coal does not. On the other hand, cement companies have to pay for the coal they use. But with hazardous waste, in contrast, companies with hazardous waste to dispose of will pay cement companies to take the hazardous waste off their hands. As a result a number of cement manufacturing plants in the United States burn hazardous waste (along with coal or the like) as fuel for their kilns.

Sometime in 1990 or early 1991, Blue Circle determined that burning hazardous waste as a fuel for its kiln would be to its advantage. In 1991, Blue Circle began the process of obtaining the necessary EPA permit.

Stephen Saunders' Environmental Concerns

Saunders—the alleged discriminatee—is an ardent environmentalist. That is, one of the concerns around which his life is focused is keeping the environment of our planet from getting any more mucked up than he believes it already is. His concern for environmental matters began at least several years before the events at issue in this proceeding.

One of the ways that Saunders has expressed that concern has been by helping to create and operate a nonprofit, volunteer-run organization called Earth Concerns of Oklahoma (ECO). It is ECO's position that the EPA regulations governing the burning of hazardous waste in cement kilns are too lax. Accordingly, it is ECO's objective to prevent Blue Circle from burning hazardous waste unless and until the EPA substantially tightens up those regulations (or until Oklahoma adopts stringent regulations of its own).

Saunders identifies himself closely with ECO.

Saunders' Employment at Blue Circle; his Conversations with the Plant Manager About Environmental Matters

Saunders began working for Blue Circle in 1981 as a production employee. But he injured his back (at the plant) and switched to a clerk-typist position in the plant's office. Saunders did not hold any union office until early 1991 when, because of the Union's concerns about the Company's plan to burn hazardous waste and because of Saunders' interest in environmental matters, Saunders was appointed the Union's environmental officer.

Douglas Pardee is the Tulsa plant's operations manager, first arriving at that facility in January 1991. He had previously held a variety of technical and management positions with various members of the Blue Circle family of companies.

Pardee and Saunders encountered one another frequently in the plant's office. That led to a running argument between them about environmental matters including, of course, the burning of hazardous waste in cement kilns. Pardee is not one to voice disagreement in carefully modulated tones. And Saunders willingly voiced his strong feelings about environmental issues. So the Pardee/Saunders arguments tended to be noisy. Despite the noisiness, and despite the difference in their positions in Blue Circle's hierarchy, Pardee was not

mean-spirited about Saunders' environmental sympathies. Thus on one occasion he proposed to Saunders that they agree to disagree about environmental issues. Another time Pardee railed at Saunders for having given false information about the burning of hazardous waste in cement kilns to a reporter, which information then showed up in a television report. But when Saunders said that he was not the source of that information, Pardee apologized.² And when the plant's chief chemist, Frank Slosar, proposed giving Saunders a large chart on "toxic and hazardous chemicals in industry" (including the chemicals in the hazardous waste that Blue Circle wanted to use as fuel), Pardee agreed.

It is clear, however, that Pardee considered Saunders' position about the dangers of using hazardous waste as fuel in cement kilns to be utterly wrong.

Blue Circle's Policy Regarding Employee use of its Photocopying Machine

As will be discussed below, Saunders would not have been fired had he not used Blue Circle's photocopying machine for purposes that Pardee considered improper. That necessarily raises the issue of Blue Circle's policies regarding employee use of the Company's photocopier.

Employees are allowed to use Blue Circle's photocopiers to make copies of documents that have nothing whatever to do with Blue Circle's business and to do so during their working time. In theory employees are supposed to pay for the copies, and some employees do so. But many employees make copies without reimbursing the Company. For example, employees who coach little league teams have used the Company's copier to make numerous copies of their teams' schedules and, without complaint from Blue Circle, have not paid for such use. Other employees have made copies of fliers for church-sponsored events, of antiabortion handouts, of contracts covering the rental of property they own, of newspaper articles that happened to interest them, and so on. Local D421 officials even use the Company's copier from time to time for union purposes, generally, but not always, paying for that use.

II.

I turn now to a brief chronology of events leading to Blue Circle's suspending and then firing Saunders.

In January or February 1991, the officers of Local D421 learned of Blue Circle's plan to use hazardous waste as fuel for the plant's kiln. As Bobby Thompson, the president of Local D421, credibly testified, he and other union officials jointly concluded that "we didn't want it."³ A significant

² The Boilermakers International and Local D421 argue that incident shows Pardee's hostility toward Saunders for his role in the Union's opposition to Blue Circle's burning of hazardous waste. I do not agree. Pardee naturally was upset about a television report that inaccurately described Blue Circle's plan to burn hazardous waste. Since it was no secret that, among the Blue Circle employees, Saunders was the most likely to provide information to the media about the burning of hazardous waste, it was not inappropriate for Pardee to raise the matter with Saunders. And Pardee's apology indicates that whatever hostility Pardee did feel toward Saunders as a result of the television report dissipated following the Pardee-/Saunders conversation on the subject.

³ Thompson was not wholly clear about who the "we" was when he testified that "we didn't want it." But given Thompson's position

reason for that conclusion was the union officials' concern that the burning by Blue Circle of hazardous waste would have a deleterious impact on the health of Blue Circle's employees. Thompson decided that the Union should actively oppose the Company's plan to use hazardous waste. (I make no finding about whether Blue Circle's burning of hazardous waste would in fact be harmful to the Company's employees. But surely, the Union's concern was not an unreasonable one.)⁴

Thompson's first actions in that direction included telling Saunders about the Company's plan and appointing Saunders to lead the fight against the Company's plan as the Union's "environmental officer" (as touched on in pt. I). Blue Circle's management was not advised of Saunders' appointment.

Saunders quickly concluded that Blue Circle's use of hazardous waste would result in the kiln's emission of arsenic, lead, and other hazardous chemicals into the air, and that that, in turn, would, over a period of time, cause health problems for anyone exposed to that air. Saunders accordingly went into action in opposition to the Company's hazardous waste plan, doing so both as the Union's environmental officer and as a member of and a spokesman for ECO.

As for ECO, the record is unclear whether that organization had previously determined to oppose the use of hazardous waste by cement companies or whether it was the news of Blue Circle's plan that generated that determination. In any case (as also touched on in pt. I), ECO adopted a policy of being "totally opposed to the burning of hazardous waste at the Tulsa plant" (in Saunders' words).

Saunders' initial response to Blue Circle's plan included:

1. Research about hazardous waste burning by cement plants. One of Saunders' main research sources was a publication of the environmental organization Greenpeace about what the publication called the "sham" recycling of hazardous waste by cement plants.
2. Finding out how Blue Circle's employees felt about the Company's plan to use hazardous waste as fuel.
3. At every union meeting beginning in January 1991, discussing his views about the dangers stemming from the burning of hazardous waste.
4. Organizing opposition to the Company's plan among the residents of communities near the plant.

Keep in mind that as Saunders fought to prevent Blue Circle from effectuating its plan to burn hazardous waste, he was fulfilling two different roles. Saunders was wearing two hats, as it were. One hat was that of Local D421's environmental officer. The other was that of an ECO activist and spokesman.

Saunders and the other officers of the Union decided to organize a rally near the plant to publicize Blue Circle's plan to burn hazardous waste, on the one hand, and the Union's contract dispute with the Company, on the other. The rally

took place during the afternoon of March 8. Several of the officers of the Union had scheduled a meeting with Pardee, for other purposes, just prior to the rally. During that meeting the rally was discussed, with the union officials telling Pardee that the Union was "totally against" Blue Circle's plan to burn hazardous waste.⁵

The rally was attended by a number of Blue Circle employees, by members of their families, by residents of communities located near the plant, and by newspaper and television reporters.

In participating in the rally, it is probable that Blue Circle's employees by and large considered the usual economic issues, such as wages, health insurance payments, overtime, and pensions, to be more important than whether or not the Company used hazardous waste as fuel. And there is no doubt that the employees and the Union viewed opposing the Company's hazardous waste plan as a way to put pressure on the Blue Circle to increase wages and the like and as a way to attract the public's attention to the employees' economic grievances.

On the other hand, there is also no doubt that Local D421's position was that Blue Circle should not use hazardous waste as fuel for its kiln and that the Union's officers and at least some Blue Circle employees were concerned about what they perceived to be the health hazards of hazardous waste burning. Thus:

1. The Union's instructions to picketers focused on usual matters but also specified that "We wish to inform the public of Blue Circle's intention to burn hazardous [sic] waste and the possible health consequences."

2. The handbills that the Blue Circle employees distributed at the rally (which handbills were drafted by Saunders) expressed concern not only about economic issues but also about "health care needs resulting from hazardous waste burning." The handbills went on to state that—

we have suffered much economic hardship. We do not wish to suffer in our health also. We oppose this move to the burning of hazardous waste and will fight to prevent it. We do this to protect our future health and the health of the surrounding community.

3. Local D421's negotiating committee chairman, Nick Adams, when speaking to reporters at the rally, referred to "the issue of burning waste and . . . how it might affect the worker" (as Adams credibly put it when testifying).

4. A picket sign carried at the rally (which sign was written by Saunders) read: "The Union against pollution."

Saunders played a major role in organizing the rally. Saunders encouraged residents of nearby communities to attend, publicized the rally among the media, and, as we have seen, drafted handbills and picket signs. But other officers of the Union were also active. For example Thompson, as a union officer, along with Adams, gave statements to reporters covering the rally.

(local union president) and the nature of his testimony, he almost surely was referring to other union officers; if he was not, then he had to be referring to other members of the local, generally.

⁴Blue Circle seems to contend that because the Saunders and his union opposed the Company's use of hazardous waste as fuel whether or not the Company complied with EPA regulations, their opposition ought to be deemed unprotected. Br. at 26, fn. 16. But I know of no rule that requires employees to refrain from urging their employer to adopt standards more rigorous than those required by the EPA.

⁵In the course of the meeting Pardee pointed out that Blue Circle had not yet applied for a permit to use hazardous waste as fuel and that the union officers had better "be careful" about what they said during the rally. On brief, Local D421 and the Boilermakers International contend that Pardee was thereby displaying his union animus. I do not find that to be the case.

As for Pardee, he was well aware of the rally, of the nature of the picket signs at the rally, and of Saunders' role in organizing the rally. But Pardee remained unaware that Saunders held any union office. In fact Pardee, who knew that Saunders had been in contact with the media, thought Saunders had done so as a spokesman for ECO rather than for the Union. On the other hand, Pardee also knew that Saunders supported the Union's effort to have the rally further the Union's objectives concerning wages and other terms of employment.

March 8 also marked the beginning of many months of informational picketing of the Blue Circle plant before work and during the lunch hour by some of its employees. Again, the picket signs spoke both to traditional contract issues and to the hazardous waste issue. Saunders was among the most frequent members of the picket line.

A second rally was held on March 20. It was very similar to the March 8 rally, including Saunders' role in it.

On March 21, Blue Circle formally submitted its hazardous waste proposal to the EPA.

On April 2, Local D421, by its negotiating committee, distributed a letter to "Tulsa plant employees." The letter, which had been drafted by Saunders, read:

We are concerned by Blue Circle's intention to burn hazardous waste at their Tulsa plant. There is strong evidence, and too many true life examples, that hazardous waste burning facilities pose a serious threat to the health of the workforce, their families and populations of surrounding communities.

Therefore we suggest that you take a few minutes to read the enclosed.

(The enclosure was a couple pages with information about what gets released into the air when hazardous waste is burned in kilns and the harmful effects of such emissions. The pages came from the Greenpeace publication on sham recycling.)

The next Saunders/Pardee encounter of concern to us occurred at the end of May. Saunders attended a zoning hearing concerning some land near the Blue Circle plant. The zoning hearing had some connection with hazardous waste matters, but it is not at all clear that the hearing had any connection whatsoever with Blue Circle. Saunders asked that his absence from work (in order to attend the zoning hearing) be excused on the ground that his attendance there was union business. Pardee, who still did not know anything about Saunders' appointment as union environmental officer and who knew that Blue Circle had no interest in the zoning matter, felt that Saunders had no basis for his request and angrily denied it, ordering that Saunders' absence be considered unexcused. But it was in the course of the Saunders/Pardee conversation about the absence that Pardee first learned that Saunders was the local's environmental officer.⁶

About the same time, a Tulsa newspaper ran an article headlined "Plant's Neighbors Appeal to [Oklahoma Gov-

ernor] Walters For Moratorium on Waste Burning." The piece included these two sentences:

Earth Concerns of Oklahoma's Stephen Saunders said the group is beginning a letter-writing campaign urging Walters to call for a moratorium on allowing incinerators in Oklahoma to burn hazardous waste until further study is done. Saunders and a new environmental group fear build up in the environment of the very small percentage of emissions that aren't burned in the process.

What is particularly interesting about that article is that readers (including, say, members of Blue Circle's management) might well come away believing that Saunders' only interest in the hazardous waste issue stemmed from Saunders' membership in ECO.⁷

Another rally was held on June 3. It was much like the two rallies in March, and again Saunders was actively involved in organizing the rally and in speaking to the media about it. A handout drafted to publicize the rally reads, in part:

Stop Blue Circle and their plans to burn hazardous waste! Earth Concerns of Oklahoma, National Toxics Campaign, Citizens Action for a Safe Environment, Concerned Area Residents for Environmental Safety, and the Boilermakers Union, Local D421 are asking citizens to join us in a demonstration in solidarity with workers and residents threatened by hazardous waste burning.

The handout goes on to discuss how Blue Circle's burning of hazardous waste would have detrimental effects on humans exposed to emissions from the plant.

That handout is significant for two reasons. The first is that, once again, it puts Local D421 on record as opposing Blue Circle's hazardous waste plan because of the threat to the health of "workers." The second is that the handout's lineup of organizations opposing the burning of hazardous waste consists almost entirely of environmental organizations, with ECO named first. Local D421 is named last.

On June 13, a newspaper called the Owasso Reporter published an article about Blue Circle's hazardous waste plan. (Owasso is a community about 5 miles north of the plant. The record suggests that emissions from the plant tend to travel north.) While the article mentioned that "some plant employees" were protesting the plan, the article suggested that it was ECO that was leading the opposition to Blue Circle's plan to burn hazardous waste, along with several other environmental organizations. The article referred to Saunders:

We used to pollute out of ignorance. Now we pollute for profit, said Stephen Saunders, ECO Member.

Again, a reader would tend to come away with the thought that Saunders' only connection with the fight over Blue Circle's plan to burn hazardous waste stemmed from his membership in ECO.⁸

⁶Local D421 and the Boilermakers International claim that Pardee's response to Saunders' request for an excused absence shows animus on Blue Circle's part; that is, hostility toward Local D421 for investigating the health and safety effects of burning hazardous waste at Blue Circle. I do not find that to be the case.

⁷The record does not specify whether anyone in Blue Circle's management read the article.

⁸And again, the record does not specify whether any member of Blue Circle's management read the article. Blue Circle argues that statements like this one constitute the kind of "disloyalty" that

A 2-day collective-bargaining session between the Union and Blue Circle began on June 13. At issue were various subjects, including the Company's hazardous waste plans.⁹ As noted earlier, Local D421 is the unit's bargaining representative. But officials of the Boilermakers International served as spokesmen for the Union at the session. That is significant because the position of the Boilermakers International regarding the use of hazardous waste as fuel by cement companies differs from that of Local D421. Namely, the International generally supports such use, subject to contractual provisions regulating how such companies use hazardous waste and who they employ to handle such materials.¹⁰

During the bargaining session the union negotiators, albeit representing Local D421, espoused the position of the Boilermakers International. Thus, the union negotiators did not oppose Blue Circle's use of hazardous waste as fuel. As one of the union spokesmen testified:

I told the Company that we wanted to sit down and negotiate on all the jobs that [had] to do with hazardous waste and especially we wanted to check the hazardous waste as it came in.

The union negotiators, in fact, appeared to encourage the Company in its efforts to obtain the permits necessary to burn hazardous waste.

III.

Saunders' Suspension

Pardee suspended Saunders on July 27.

A week or so earlier, Slosar (the chief chemist) had mentioned to Pardee that he had overheard conversations at the plant to the effect that Saunders was using the Company's copying machine to make copies of materials in opposition to Blue Circle's plan to burn hazardous waste—fliers for use at rallies and the like. Slosar asked Pardee what procedure to follow if he saw Saunders doing that. Pardee responded that in such event Saunders should be suspended and sent home.

Pardee did not ask Slosar (or anyone else) to spy on Saunders to see if Saunders could be caught in the act. On the other hand, neither Pardee nor anyone else sought to forestall a confrontation by telling Saunders about the rumors concerning such use of the copying machine and advising Saunders that Pardee did not want Saunders to use the machine for such purposes.

render unprotected what otherwise would be protected activity. I discuss that contention in pt. V, below. Here, I note only that the Company does not argue that this statement by Saunders to the press had anything to do with Pardee's decision to fire Saunders.

⁹About 2-1/2 months earlier, Local D421 had sent the following proposal to Blue Circle: "The Company will not enter into a contract and/or burn hazardous waste at the Tulsa plant without first contacting the president of the Local Lodge and negotiating on this issue."

¹⁰The fact that officials of the International conducted the bargaining does not conflict with my earlier finding that Local D421 represents Blue Circle's employees. Cf. *Vermont Marble Co.*, 301 NLRB 103 (1991). I note, moreover, that Blue Circle agrees that Local D421 is the representative of the Company's employees. See its Br. at 3-4.

Saunders was scheduled to work 7 a.m. to 3 p.m. on July 27, a Saturday. No one else was scheduled to work in the office that day. As Saunders testified, "I'm pretty much on my own there on Saturdays." Saunders arrived at work on schedule.

At about 8 a.m., Saunders went over to the office photocopier and began copying pages from the Greenpeace publication on sham recycling. Saunders copied seven pages of the publication, making five copies of each page. (The pages discussed the toxicological properties of heavy metals; as indicated earlier, Saunders was concerned that heavy metals in hazardous waste would be released to the atmosphere by the burning of hazardous waste in Blue Circle's kiln.)¹¹ Saunders testified that he planned to give the copies to the other officers of Local D421. For reasons I discuss in section VI, I do not credit that testimony.

Ordinarily Pardee does not appear at the office early on Saturday mornings. Unfortunately for Saunders, Pardee had agreed to meet Slosar in the office that morning (on matters unconnected with Saunders). Pardee arrived at the office and saw Saunders at the copying machine. Given Pardee's previous conversation with Slosar about Saunders' use of the copying machine, it was inevitable that Pardee would be interested in what Saunders was copying.

Pardee took a look, saw that Saunders was copying from the Greenpeace publication, jumped to the conclusion that Saunders was making the copies for ECO, and exploded in anger, cursing at Saunders. Then, realizing that he had lost control of himself, Pardee left Saunders, went to his office, and set up a meeting to consider the matter. The meeting was held in Pardee's office about 9 a.m. In attendance: Pardee, Saunders, Slosar, and (as a stand-in for a union steward) employee Gary Parks.

Pardee opened by telling Saunders that he was suspended without pay for using the company photocopier for copying pages from a Greenpeace document that was in direct conflict with the Company's interest, doing so without permission and on company time. Saunders knew very well that Pardee was angry because of the nature of the document being copied, not merely because Saunders was using the copier for non-Blue Circle reasons. Nonetheless Saunders opted for a response which ignored the difference between copying ball game schedules, say, and copying a document whose purpose was to prevent cement companies from using hazardous waste as fuel. What Saunders said was that he had longstanding permission to use the copying machine for personal purposes and that other employees routinely used the machine for personal reasons.

¹¹To provide some sense of the nature of the pages Saunders copied, here are some brief excerpts:

The toxicological properties of the heavy metals identified in the emissions and residues of waste-burning facilities are listed below.

Aluminum—Aluminum has been implicated in Alzheimer's disease.

Antimony—A suspected carcinogen.

Arsenic—A human carcinogen. Possible mutagen.

Beryllium—Demonstrated carcinogenic effects in lungs of exposed workers.

Cadmium—an experimental carcinogen, tumorigen.

Chromium—an experimental tumorigen and suspected carcinogen.

While Saunders' response was accurate (as far as it went), it infuriated Pardee. The meeting ended at that point. Saunders left the plant.

The Package Saunders Mailed to the Coxes

As of July 27, Saunders was in the midst of publicizing a meeting sponsored by ECO and other environmental organizations to be held in Owasso on August 5, the purpose of which was to continue Saunders' effort to organize the public against Blue Circle's plan to burn hazardous waste. Saunders knew two Owasso residents, Jean and Bruce Cox, and knew that Jean Cox was worried that Blue Circle's use of hazardous waste would have a harmful impact on the health of the residents of Owasso. Saunders wanted to send a packet of fliers announcing that August 5 meeting to the Coxes, in the hope that the Coxes would distribute the fliers in Owasso. Accordingly, on arriving at the plant on July 27 (the day of Saunders' suspension), Saunders stuffed the fliers into a large envelope, typed the Coxes' address onto a Blue Circle address label, put the label on the envelope, used the Company's postage meter to affix \$2.30 postage to the envelope, and put the envelope into the Company's rural-type mailbox to await pickup by the Postal Service. (Saunders testified that he did not use a Blue Circle label and that he used stamps, not a postage meter, for the postage. I discuss in section VI why I think that testimony is contrary to the weight of the evidence.)

On July 27, after Pardee sent Saunders home, Pardee called Blue Circle Sales Manager Jim Benson to request that, for that 1 day, Benson handle Saunders' shipping clerk functions. In the course of their conversation Pardee told Benson that Saunders had been suspended for copying improper materials on the photocopying machine.

About 10:30 a.m., Benson took some mail out to the Blue Circle mailbox. Benson noticed the large envelope that Saunders had put there; it was noteworthy both because of its size and because it was addressed to individuals, "J and B Cox" in Owasso, rather than to companies with which Blue Circle would ordinarily be doing business. Benson thought that the envelope might be significant in view of Pardee's mention that Saunders had been sent home for improper use of the copying machine. So Benson took the envelope back inside. Since Pardee had already left the office, Benson made a copy of the face of the envelope and put the envelope back in the mailbox.

Sometime that same Saturday Benson came across a copy of Saunders' flier (the one about the August 5 meeting) in the office. (I discuss this finding in section VI, in conjunction with the discussion about Saunders' envelope.)

On Monday, July 29, Benson showed the copy of the face of the envelope to Pardee. Benson also showed Pardee the flier he had found. Pardee decided that Benson's discoveries warranted further investigation and hired a private investigator in order to find out who the Coxes were and whether they received a package from Saunders. (The record does not tell us what the investigator reported to Pardee other than to indicate that the Coxes told the investigator that they had not received any package from Saunders.)

At about 3:30 p.m. on August 5, Pardee and Saunders' immediate supervisor, Plant Administrator Hugh Simon, met with Saunders, Local D421 President Thompson, and the Union's negotiating committee chairman, Nick Adams.

Pardee had by then contacted Blue Circle headquarters in Atlanta about Saunders. During the meeting headquarters faxed Pardee a letter Pardee could use if he chose to fire Saunders. (As of the start of the meeting Pardee had not concluded that Saunders should be discharged.)

It is unclear exactly what was said at the meeting or the order in which things were said. But the discussion included the following exchanges:

1. Pardee asked Saunders if he had used the office copier to copy pages from the Greenpeace document. Saunders admitted that he had but went on in an aggressive tone of voice to say that everyone used the copier for personal reasons and, anyway, Saunders had had permission from Blue Circle's past three administrators to use the copier for personal reasons. That immensely irritated Pardee, whose focus was on the subject matter of the document that Saunders copied, not on the fact that it was for noncompany purposes. Saunders went on to allege that Pardee was using the circumstance to get even with Saunders for his antihazardous waste efforts that Saunders had been engaged in on his own time. That irritated Pardee even more.

2. Pardee, showing Saunders a copy of the face of envelope to the Coxes that Benson had found in the Company's mailbox, asked Saunders if he had sent it. Saunders admitted that he had mailed a package to the Coxes but contended that the envelope he had placed in the mailbox was hand-addressed and had stamps on it, not a postage-meter tape. Pardee heard that as a contention by Saunders that Pardee had torn Saunders' envelope off the package, put the materials in a new envelope with the Blue Circle label and Blue Circle postage, and then pretended that the envelope had been found in the mailbox that way. Pardee took that as a statement by Saunders that he (Pardee) was lying.

3. Thompson furiously accused Pardee of "tampering with the U.S. mails." All that Thompson meant was that Pardee (or someone on his behalf) had taken Saunders' package out of the mailbox. But Pardee assumed that Thompson was supporting Saunders about Pardee having repackaged Saunders' package to the Coxes. Pardee responded angrily. Thompson went on to attack Pardee for hiring a private investigator. That did nothing to calm Pardee.

4. At least once in the midst of all those flared tempers, Pardee said something about Saunders being fired for improperly using the photocopier for personal purposes (without specifying that Pardee was concerned wholly about the subject matter, not the fact of use for non-Blue Circle purposes). Adams and Thompson responded by pointing out that the mere use of the photocopier for non-Blue Circle purposes was an altogether commonplace event to which the Company had given its, at least, tacit approval.

As far as Pardee was concerned, the discussion had shown that Saunders was absolutely unwilling to acknowledge that there was something wrong with using the office photocopier to make copies of materials that ECO would later use in its attacks on Blue Circle. (Pardee remained certain that Saunders had done the copying in connection with his ECO activities.) On top of that, Pardee believed, Saunders had lied about his package to the Coxes and, to make matters worse, had suggested that Pardee had engaged in the grotesque skulduggery of opening Saunders' package, repacking it, and then pretending that he had done neither.

As touched on earlier, at the start of the meeting Pardee had not been clear that he was going to fire Saunders. But at this point he was very clear that Saunders should not remain a Blue Circle employee.

By this time the letter that headquarters had drafted concerning Saunders' discharge had arrived at Blue Circle and been retyped. Pardee signed the letter, then gave it to Saunders to read. The letter read:

Dear Mr. Saunders:

On July 27, 1991, you were observed in the Company's office making improper use of Company copying equipment and materials. The information you were copying was unrelated to Company business and was, in fact, contrary to the Company's business interests.

While I have stated in the past that employees' opinions and what they do on their own personal time is their own business, the Company cannot condone an employee working against the Company's legitimate business interests while he is being paid by the Company and while he is using Company equipment and materials.

Accordingly, your employment with Blue Circle is terminated effective August 5, 1991, based on your actions of July 27, 1991. . . .

Sincerely,

Douglas D. Pardee
Operations Manager

After Saunders had left, Pardee turned to Thompson and Adams with some final words about Saunders. According to Thompson's credible testimony:

Mr. Pardee told Nick [Adams] and [me] that he hated to let Stephen go, he really didn't want to do that. He said that he liked Stephen. But he had talked to [plant industrial relations manager] McCormac about putting Stephen in another position, but due to Stephen's disabilities and his seniority, there's no other place in the plant that he could go. And Doug—Mr. Pardee said, "I cannot and I will not have him back in this office."

IV.

The question to be addressed in this part of the decision, and in section V, is whether the facts discussed above add up to a violation of the Act by Blue Circle.

Did Saunders' Activities Prior to July 27 Affect Pardee's Decision to Fire Saunders

Starting in March, or even earlier, Saunders was a major force in the attack on Blue Circle's plan to use hazardous waste as fuel for its kiln. I will assume that if Blue Circle would not have suspended or fired Saunders but for such activities, then Blue Circle violated Section 8(a)(3) and (1) of the Act. (That would plainly be the case if Blue Circle took into account Saunders' activities on behalf of the Union. The issue would become more complicated if Blue Circle's action against Saunders had been based only on Saunders' ECO activities.)

That raises this question: if Saunders had not engaged in such pre-July 27 activities, would Pardee have responded so

vehemently to Saunders' use of the photocopier? The answer is: the record does not tell us.

True, Blue Circle had never before fired anyone for misusing the photocopier. But Saunders' use of the copier was quite different from any other to which the record refers. It is also true that Pardee was eager to put into effect the Company's plan to burn hazardous waste in its kiln and that Pardee knew that Saunders was in the forefront of the opposition to the plan. But the record gives no indication that Pardee would consider firing an employee simply for opposing the plan. Lastly, there is no indication that Saunders' protected activities in the period just prior to July 27 were particularly irritating to Pardee.

Under the circumstances, I conclude that the General Counsel failed to make a prima facie showing that Saunders' pre-July 27 protected activities were a basis for Blue Circle's suspension or firing of Saunders. See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

That, however, is by no means the end of the matter.

The Relationship Between Saunders' use of the Photocopier and Section 7 of the Act

As touched on earlier, and as will be more fully discussed in section VI, below, we have no credible testimony from Saunders about what his purpose was in making the copies, nor do we know to whom Saunders intended to give the copied pages. Thus, it is entirely possible that the copies were destined for persons not employed by Blue Circle. It also is entirely possible that, as Saunders copied the pages, his focus was on ECO concerns.

On the other hand, we do know:

(1) The copied pages were part of a publication aimed at preventing cement companies from burning hazardous waste as fuel for their kilns.

(2) All of Saunders' activities to which the record refers that had to do with cement companies' use of hazardous waste were aimed specifically at preventing Blue Circle from burning hazardous waste.

(3) Local D421 opposed Blue Circle's burning of hazardous waste, with that opposition stemming at least in part from a concern about the effect of the resulting emissions on the health of the Company's employees.

(4) Saunders believed that Blue Circle's use of hazardous waste as fuel would be harmful to his health and to the health of his coworkers (as well as to the health of residents of nearby communities).

(5) The Union appointed Saunders as its environmental officer as part of the Union's effort to keep Blue Circle from effectuating its plan to burn hazardous waste.

(6) As a deliberate tactic the Union sought to enlist the residents of nearby communities, and the public at large, in the fight against Blue Circle's plan to burn hazardous waste.

In light of these considerations, I conclude that Saunders' use of Blue Circle's photocopier on July 27 to make copies of pages from the sham recycling publication constituted protected activity. I reach that conclusion by two routes.

The first is that, no matter to whom Saunders intended to give the copies, Saunders surely made the copies to further his opposition to Blue Circle's plan to burn hazardous waste. (That, indeed, is why the Company fired him.) As such,

Saunders' use of Blue Circle's photocopier was the "logical outgrowth" of earlier activities that plainly were protected by Section 7: the Union's opposition to Blue Circle's plan to burn hazardous waste, the Union's efforts to involve the public, and the Union's appointment of Saunders as its point man in the fight against the Company's plan. See *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), in which the Board held: "We will find that individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [the] logical outgrowth of the concerns expressed by the group."

The second route is that, given the fact that the Union appointed Saunders to lead the fight against Blue Circle's plan to use hazardous waste, given that Saunders made the copies in furtherance of his opposition to that plan, and given Saunders' concern about the impact of the burning of hazardous waste on the health of Blue Circle's employees, all efforts by Saunders to prevent the Company from putting its plan into effect prima facie constituted concerted protected activity. Accordingly, it was up to Blue Circle to overcome that prima facie showing (as, say, by proving that Saunders used the copier solely because of his concern about the effects of the burning of hazardous waste on the residents of Owasso). Cf. *Wright Line*, supra. That Blue Circle did not do.

Both of these routes presume that an employee's activity may be protected even if a reason—or, indeed, the main reason—that the employee engaged in it had nothing to do with the mutual aid or protection with which Section 7 is concerned. (As noted above, it could be that as Saunders copied the pages, his focus was on ECO matters.) The parties have not pointed me to any precedent that addresses this issue; that is, the issue of whether an employee's activity is protected if the employee had dual or joint reasons for acting, one reason having to do with mutual aid or protection among employees, and one not.¹² It seems to me, however, that the purposes of the Act would be better fulfilled if an activity is deemed protected so long as one of the reasons the employee engaged in the activity was for mutual aid or protection (and the activity otherwise would be found to be protected).

V.

Blue Circle argues that even if Saunders' use of the photocopier ordinarily would be protected, it is not in this case because: the Union did not in fact oppose Blue Circle's plan to burn hazardous waste; Saunders' efforts to convince the public to oppose Blue Circle's plan constitutes impermissible disloyalty; and the Company had the right to discipline Saunders for using its equipment to work against the Company's legitimate interests.

I turn now to these arguments.

¹² The briefs of the General Counsel and the Unions proceed entirely on the basis that Saunders was using the photocopier in order to provide copies to fellow union officers (which I have found not to be the case) and/or that the Company suspended and fired Saunders because of his pre-July 27 union activities (which I also have found not to be the case). Blue Circle's brief argues that Saunders was using the photocopier for ECO purposes and that Saunders' use of the photocopier was therefore unprotected by the Act.

Saunders' use of the Company's Photocopying Machine for Purposes Contrary to Blue Circle's Legitimate Interests

As I earlier discussed, Blue Circle routinely permits employees to use the Company's photocopier, during their worktime, to copy personal, noncompany materials. Under such circumstances, Blue Circle may not lawfully discipline an employee for using the machine where the employee is doing so in concert with other employees in order to achieve objectives encompassed by Section 7 of the Act,¹³ even if the materials being copied constitute an attack on the Company. *Champion International Corp.*, 303 NLRB 102 (1991); cf. *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983); *Richards United Super*, 308 NLRB 201 (1992).¹⁴

Were Saunders' Efforts to Stop Blue Circle's Burning of Hazardous Waste Contrary to the Union's Position

Blue Circle contends "at the time of Saunders' discharge, there was no dispute between the Company and the union concerning the Company's use of waste-derived fuels." (Br. at 30.) The claim is, that is to say, that Saunders' efforts to keep the Company from using hazardous waste as fuel were not in furtherance of Local D421's position and, in fact, were contrary to it. And, indeed, where an employee, or a group of employees, seeks to achieve objectives contrary to that of the union that is the unit's exclusive bargaining representative, and does so by bypassing the union, such efforts may be unprotected. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975); *River Oaks Nursing Home*, 275 NLRB 84 (1985).

And, as the Company points out, it is true that in course of the June 13–14 negotiating session, the Union's negotiators seemed to support the Company's use of hazardous waste as fuel (subject to certain conditions).

But day-in, day-out, starting in March 1991 and continuing at least through the date of the hearing, Blue Circle employees participated in rallies and picketed the Company carrying signs that proclaimed the employees' opposition to the Company's use of hazardous waste. Moreover Saunders never sought to bypass the Union and negotiate directly with Blue Circle. Under these circumstances it would appear that the expression by Saunders of his opposition to the burning of hazardous waste would have been protected even if, at the time Blue Circle fired Saunders, the Union had in fact concluded that it should support Blue Circle's plan to burn hazardous waste. See, e.g., *Samsonite Corp.*, 206 NLRB 343, 346 (1973).

In any case, the Union had not come to any such conclusion. It never entered into any agreement with Blue Circle by which the Union agreed to the Company's use of hazardous waste as fuel. And both before and after the events leading to Saunders' discharge, the Union expressed its opposi-

¹³ Needless to say, concerted employee action intended to further on-the-job health and safety is protected by Sec. 7. E.g., *Martin Marietta Corp.*, 293 NLRB 719, 725 (1989).

¹⁴ I assume that if Blue Circle had limited the noncompany use of its photo copier "to a small number of isolated 'beneficent acts,'" the Company could lawfully have disciplined Saunders for his use of the machine on July 27. *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982). But the record shows that the Company did not limit the use of the photocopier in that manner.

tion to the Company's plan. Recall, for example, the Union's April letter to employees claiming that "hazardous waste burning facilities pose a serious threat to the health of the workforce." And in November (1991) the Union sought to have the Oklahoma State AFL-CIO go on record as opposing the use of hazardous waste as fuel for cement kilns.

What that adds up to is that, at most, the Union's position was ambiguous concerning the use by Blue Circle of hazardous waste as fuel. More accurately, the position concerning hazardous waste that the Union expressed at the bargaining sessions on June 13 and 14 was a temporary one, one stemming from the identity of the persons negotiating on behalf of the Union. Except for that one-time expression of contingent approval, the Union consistently opposed Blue Circle's use of hazardous waste. Thus, Saunders' efforts to prevent the Company from burning hazardous waste were in support of the Union's position, not contrary to it.

Disloyalty

Blue Circle argues that Saunders' use of the photocopier was unprotected by the Act if only because: (1) Saunders was going to use the copied materials to attempt to persuade the public to oppose Blue Circle's plan to burn hazardous waste; and (2) that activity constitutes impermissible disloyalty. In this latter regard Blue Circle cites *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

As discussed above, it may well be that, as the Company argues, Saunders was going to use the copied materials in his effort to have the public-at-large oppose Blue Circle's plan.

Additionally, I have found that a reason that the Union brought Blue Circle's plan to use hazardous waste as fuel to the public's attention was to strengthen the Union's hand in its effort to improve the kinds of terms of employment commonly found in collective-bargaining agreements (wages, insurance benefits, and the like). And I will assume, for argument's sake, that if that was the only reason that the Union opposed the Company's plan to burn hazardous waste, *Jefferson Standard* would apply. (I note, however, that unlike the employee behavior at issue in *Jefferson Standard*, at no time did either the Union or Saunders attack the quality of the product that Blue Circle produced (cement). Their opposition was directed solely at a proposed change in the way the Company manufactured the product. And in *Jefferson Standard* the employees did not disclose that they were in the midst of a labor dispute with their employer, while here the Union did.)

In any event, I have also found that there was another reason that both Saunders and the Union opposed the Company's plan to burn hazardous waste. Namely, they believed that, were the Company to put the plan into effect, the resulting emissions would adversely affect the health of Blue Circle's employees. And a reason that Saunders and the Union brought the Company's plan to the attention of the public was to garner public support for the Union's effort to protect Blue Circle employees from such emissions.

Under these circumstances, it is altogether evident that the rationale of *Jefferson Standard* does not apply. In *Jefferson Standard* the employees attacked the quality of their employer's product; that was not the case here. In *Jefferson Standard* the employees' attack "related itself to no labor practice of the Company. It made no reference to wages, hours, or

working conditions" (346 U.S. at 476). Here, the Union (and Saunders) made it clear to the public that Blue Circle's employees were concerned about the impact on their working conditions of Blue Circle's burning of hazardous waste. In *Jefferson Standard* the employees' "attack asked for no public sympathy or support." (Id.) Here, the Union (and Saunders) clearly did. In *Jefferson Standard* the employees' handbills "attacked public policies of the Company which had no discernible relation" to the underlying controversy between the employees and their employer. (Id.) Here, the Union (and Saunders) went to the public about the precise "policy" of Blue Circle that concerned the employees—the policy of using hazardous waste as a fuel.

See generally *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942); *Motorola, Inc.*, 305 NLRB 580 (1991); *Allied Aviation Service Co.*, 248 NLRB 229 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980).

Pardee's Belief that Saunders' Use of the Photocopier was Solely for ECO Purposes

Pardee testified that he believed that Saunders was copying the sham recycling publication in order to provide copies to Saunders' fellow ECO members. I credit that testimony as an honest expression of Pardee's belief. Further, as I add up the record, the evidence fails to show union animus on Pardee's part. As a result I conclude that Blue Circle did not suspend or fire Saunders because of his support for the Union and, accordingly, that Blue Circle did not violate Section 8(a)(3) of the Act.

But whatever Pardee believed, Saunders' use of the photocopier on July 27 was concerted protected activity (as discussed earlier). Pardee's belief to the contrary thus does not protect the Blue Circle from being held to have violated Section 8(a)(1). See *Roadmaster Corp. v. NLRB*, 874 F.2d 448 (7th Cir. 1989). Further, given the ongoing presence at the plant of the pickets whose signs, after all, denounced Blue Circle's plan to burn hazardous waste, Pardee should have recognized the connection between Saunders' use of the photocopier and the Union's antihazardous waste position.

VI.

Why I Have Found that Saunders did not Intend to Give the Copies to Union Officials or Other Blue Circle Employees

Saunders testified that he was copying the pages from the sham recycling publication in order to provide copies to the Union's five other officers.

But Saunders did not tell Pardee that he was making the copies for that purpose when Pardee caught him at the photocopier on July 27. Saunders did not say so in the meeting later that morning. He did not say so in a conversation with fellow union officer Adams 2 days later. He did not say so during the August 5 meeting (at which Pardee discharged Saunders). Instead Saunders kept referring to his right to copy materials for "personal" reasons. Moreover, at no time during that period did any officer of the Union tell the Company that Saunders' photocopying efforts on July 27 were for union purposes.

Finally, even on August 6, when Saunders filed a grievance over his suspension and discharge, Saunders continued

to refer to his “personal” reasons for using the photocopier.¹⁵

I can understand that when Pardee first came across Saunders at the photocopier on July 27, even had Saunders in fact been planning to give the copies to his fellow union officers Saunders might have thought that saying so would *really* get him into trouble. But, had Saunders actually been using the photocopier to provide copies to union officers or other Blue Circle employees, sooner or later in the period through Saunders’ filing of his grievance, either Saunders or one of the other union officers would have said so. Since they did not, and since Saunders kept referring to his “personal” reasons for his use of the photocopier, I am convinced that Saunders was making the copies to provide to persons who had no direct connection with Blue Circle.

The Package to the Coxes

As discussed above, Saunders testified that he wrote the Coxes’ address on the envelope by hand, and used stamps, not a postage meter, for postage. Benson testified to the contrary. According to Benson, the address on the envelope he found in the mailbox was typed and the envelope carried a postage meter tape. As far as demeanor is concerned, both Saunders and Benson were equally credible.

It could be that Benson was lying. It could be that he saw the package, thought it important to determine what was in it, opened it, took out one of the fliers, then realized that by tampering with the package he might have committed a crime. Under this hypothesis, Benson then put all the fliers (with the one exception) in a new envelope, typed up a label, used the postage meter for postage, photocopied the face of the envelope, and then—perhaps—put the package back in the mailbox.

Even under this assumption I believe that Pardee thought that Benson had found the envelope in the form shown by the copy of its face.

But the likelihood that Benson engaged in such behavior seems to me to be remote. In particular, it is hard to imagine that Benson would go out of his way to preserve evidence of his misbehavior by photocopying the face of the new envelope.

As for the probability of Benson’s version, it was commonplace for employees to use Blue Circle’s postage meter (although they were always expected to reimburse the Company for such use). And it would have been natural enough for Saunders to type the Coxes’ address on a Blue Circle label. Then, when Pardee raised the matter at the August 5 meeting, at which meeting Saunders must have been terrified about the possibility of losing his job, it is understandable

that Saunders might blurt out the claim that he did not use the postage meter.

I thus find Benson’s version more credible than Saunders’.

In any case, the issue has only tangential relevance. As Blue Circle agrees, Saunders would not have been fired had he not used Blue Circle’s photocopier to copy pages from the “sham recycling” publication.

Other Matters

Local D421 and the Boilermakers International argue, along with the General Counsel, that the reasons Blue Circle put forward for suspending and firing Saunders kept shifting, and that this shows that Blue Circle deliberately fired Saunders for his union activity. As my discussion of the facts indicates, I do not find that argument persuasive.

Blue Circle follows a progressive disciplinary system in respect to many types of discipline-worthy employee behavior. No such system was used in Saunders’ case. Again, the General Counsel and the unions argue that this proves illicit intent on Blue Circle’s part. And again, as my discussion of the facts shows, I do not find that to be the case.

CONCLUSIONS OF LAW

1. Blue Circle is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.

2. Local D421 and the Boilermakers International are labor organizations within the meaning of Section 2(5) of the Act.

3. Blue Circle violated Section 8(a)(1) of the Act by suspending its employee Stephen Saunders on July 27, 1991, and by discharging him on August 5.

4. The foregoing unfair labor practices affected commerce within the meaning of Section 2(7) of the Act.

REMEDY

Because Blue Circle suspended and then discharged employee Stephen Saunders in violation of Section 8(a)(1), the Company will be required to offer to reinstate him and must make him whole for any loss of earnings and other benefits he suffered as a result of such unfair labor practices. Loss of earnings and benefits shall be computed on a quarterly basis from the date of Saunders’ suspension to the date of proper offer of reinstatement, less any interim net earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, Blue Circle Cement Company, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending or discharging an employee for using its photocopy machines where the effect of which is to interfere

¹⁵ Saunders, grievance reads:

On July 27, 1991 I was suspended without pay for a total of 9 [days] for using the Company Copier for personal paper work. On August 5 I was terminated for the same reason. I believe I was unfairly and wrongly discharged. Many times in the past ten years I have asked and been granted permission to use the Copier by office managers. I have also offered payment to various office managers and it has always been refused. It is a very common practice for both employees and staff to use these machines for their own use. For instance, Randy Kriel run 500 copies of an Anti-Abortion flyer. I feel my termination was due to my out spokenness [sic] on the hazardous waste issue.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Stephen Saunders immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result the Respondent's action against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the Respondent's unlawful suspension and discharge of Saunders and notify Saunders in writing that it has done so and that it will not use the suspension or discharge against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(d) Post at its facility in Tulsa, Oklahoma, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respond-

ent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT suspend or discharge employees for using our photocopy machines where the effect of such action is to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Stephen Saunders immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole, with interest, for any loss of earnings and other benefits he suffered as a result of our action against him.

WE WILL remove from our files any reference to our unlawful suspension and discharge of Saunders and WE WILL notify Saunders in writing that we have done so and that we will not use the suspension or discharge against him in any way.

BLUE CIRCLE CEMENT COMPANY, INC.

¹⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."